CASE NO. 82–876

Supreme Court, U.S.
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ALEXANDER L. STEVAS

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

R. C. MARSHALL, Superintendent,
Southern Ohio Correctional Facility,
Petitioner,

v.

CRAIG FOWLER,
CHARLES JORDAN,
LARRY JOHNSON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION TO CERTIORARI

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STATUS OF THE PARTIES

Petitioner concurs with the notation in respondents' answer brief that respondent Fowler is now in the custody of the London Correctional Institution and respondents Jordan and Johnson are now in the custody of the Marion Correctional Institution. The Superintendents of these facilities are respectively A.R. Jago and E.P. Perini. In order to avoid confusion, the original caption has been utilized in this reply brief.

REPLY ARGUMENT IN SUPPORT OF CERTIORARI

I. WHETHER A STATE TRIAL COURT HOLDING THAT "I FIND THE STATEMENTS WERE VOLUNTARILY GIVEN AND WERE NOT GIVEN BECAUSE OF THREATS, COERCION, AND ABUSE" IS SUFFICIENTLY PARTICULAR TO BE ACCORDED THE PRESUMPTION OF CORRECTNESS MANDATED BY PRINCIPLES OF FEDERAL–STATE COMITY AS CODIFIED IN 28 U.S.C. SECTION 2254(d) WHERE SUCH HOLDING WAS MADE AFTER A FULL AND FAIR EVIDENTIARY HEARING IN WHICH CONSIDERABLY DISPUTED TESTIMONY COULD ONLY BE RESOLVED ON THE BASIS OF A CREDIBILITY DETERMINATION; UNDER SUCH CIRCUMSTANCES MAY A FEDERAL APPEALS COURT REQUIRE A NEW FEDERAL EVIDENTIARY HEARING, EIGHT YEARS AFTER THE FACT, WHERE SUCH

EVIDENTIARY HEARING WAS NOT ONLY NOT REQUESTED IN THE DISTRICT COURT BUT STIPULATED AS BEING UNNECESSARY.

Petitioner fairly characterizes respondents' answer brief as an attempt to avoid certiorari at all costs. The only explanation for the misrepresentations and irrelevancies of that answer, which will be discussed in this reply, is a recognition that this Court could not and would not condone the appellate court's decision in this case on the merits.

Three major responses are made as to why certiorari is inappropriate. The first, as expected, is simply that this Court is too burdened with cases to deal with a clear departure from established procedent.[1] Petitioner recognizes, as all litigants must, that this Court on certiorari does not sit to correct erroneous factual applications when the correct standard is utilized. It must be comforting however to the lower courts that this Court is now too burdened to correct even a case where the proper precedential authority has not been utilized. Respondents characterize this criticism of the lower court as being an attack on the integrity of the appellate court. But one need not impute improper motives to the appellate court judges to believe that they have philosophi-

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1. Respondents, on several occasions, note the voluminous record in this case, presumably to raise the spectre that even if this Court didn't have as many cases before it as it does that this Court would have to expend extraordinary effort to review this case. While the transcript of the trial is over 8000 pages, the transcript of the motion to suppress hearing in question comprises 663 pages. Moreover, the length of the trial in this case argues for certiorari, not against it. Ohio certainly has an interest in review of a decision which overturns the finality of a conviction obtained by the expenditure of such efforts.

cally misunderstood the precedent and direction from this Court.[2] Respondents assert that this is not such a case because Judge Engel, who dissented from the opinion, did not vote for rehearing en banc. The record does not support this assertion however as the entry merely states a petition for rehearing was filed and denied and does not specify the vote of the Court. (A 60). One wonders why Judge Engel would author his cogent, lengthy, and thorough dissent, if he simply meant to accept the final result as being the proper direction for the lower appellate court to take. The bottom line is that it is somewhat incongruous that respondents, having destroyed the finality of a once thought valid conviction, should now oppose certiorari on the grounds that the criminal law system demands finality.

The second argument is that this case is somehow not important to either Ohio or the nation to warrant certiorari. Respondents point to petitioner's citation of *Lonberger v. Jago,* 635 F. 2d 1189 (6th Cir. 1980), *vacated and remanded,* _____U.S._____, 68 L. Ed. 2d 290 (1981), *opinion after remand,* 651 F. 2d 447 (6th Cir. 1981), *cert. granted sub. nom Marshall v. Lonberger,* _____U.S._____, 71 L. Ed. 2d 292 (1982), and *Clark v. Jago,* 676 F.2d 1099 (6th Cir. 1982), *cert. pending,* as well as this case, for the proposition that Ohio is merely "thrice disaffected". While it is certainly true that Ohio has been thrice disaffected, Ohio seeks to prevent being disaffected for a fourth time, etc., by establishing that the appellate court has not properly followed either *Sumner v. Mata, (I)* 449 U.S. 539 (1981) or *LaVallee v. Delle Rose,* 410 U.S. 690 (1973). That matter affects

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2. Indeed, this Court has granted certiorari and reversed where an appellate court has misapplied the controlling legal standards to the facts before it. *Mitchell v. Rose,* 443 U.S. 545 (1979). Certiorari is important in such circumstances to reemphasize what the controlling legal standards are.

all habeas corpus cases throughout the nation and petitioner's citation to these cases establishes that the dispute is fundamental. Moreover, regardless of the existence or outcome of the other cases, Ohio would still seek certiorari in this case.[3] The appellate court has established a precedent by which few, if any cases, can withstand scrutiny. As aptly stated by Judge Engel,:

> Upon the strength of the majority's opinion, if it stands, it will not hereafter be difficult to disregard the findings of state trial judges by merely pointing to some conflict in the testimony and holding that it should have been specifically resolved by written findings. We shall then be back where we were before Chief Justice Warren's admonitions of *Townsend v. Sain* were incorporated into section 2254.

(A 30) Under the appellate court's view, the presumption of 28 U.S.C. Section 2254 is a presumption without substance. While respondents suggest that Ohio's institutional need for correction of this error can be cured through the Court's response in *Lonberger, supra,* it makes no sense why these respondents should still nonetheless benefit. It again, must be comforting to know that this Court cannot correct a clear departure from precedent.

The third response is a pure historical revision of the record in this case. Respondents suggest there is no

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3. It, of course, remains to be seen whether Ohio is thrice disaffected. In *Lonberger,* this Court has granted certiorari, and the matter has been argued. *Clark* is still pending.

incongruity in their statement to the district court that no evidentiary hearing was necessary and the appellate court's remand for an evidentiary hearing.[4] Respondents hypothesize that their claim in the district court that they were entitled to a verdict based on the record subsumes a claim that they are entitled to a verdict on a new record. The only brief on the merits filed by the respondents in the district court was their motion to alter and amend judgment. Therein, the only argument respondents made was the blatantly incorrect one that the district court should make new credibility assessments from the record and reach an opposite result from the trial court. A sample follows:

> This complete reliance on state court findings conflicts with the well established principle of review as set down by the Supreme Court: . . .The Court has determined that independent review of alleged coerced confessions and involuntary statements is always required by the federal courts.[2] (footnote omitted). . .
>
> Thus, it is incumbent on this Court to review the facts independently of the state court's determination and make a de novo finding of their merit.

(Motion to Alter and Amend, page 5) (Not reproduced in appendix) The respondents' argument in the district

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4. It is true that petitioners and respondents never reached a formal stipulation that no evidentiary hearing was necessary. That suggestion, which petitioner obviously agreed with, was made sua sponte by respondents. Under the circumstances, the suggestion that there was no agreement that an evidentiary hearing was not necessary is even more incongruous.

court sounds as if *Sumner* had never been decided. As a final matter, it must be comforting to litigants, that despite clear precedent to the contrary, an appellate court will recognize and grant relief on an argument never presented to the court whose judgment is being reviewed.

In an attempt to avoid certiorari, and thus reversal, the respondents make other historical revisions of the record which must be noted. *First,* respondents suggest that the State has not been prejudiced because, despite the passage of eight years, no claim was made pursuant to Rule 9, Rules Governing Section 2254. No Rule 9 claim was made because the State was not prejudiced in responding to the petition. But the State is clearly prejudiced in responding to a new evidentiary hearing eight years after the fact after memories have faded. *Second,* respondents assert that much of the delay in this case is attributable to the State's overcharging the respondents, thus resulting in a lengthy record which delayed appellate and habeas corpus review. While charged with 33 counts and convicted of 6, the factual record establishes that the State produced evidence as to all counts charged and that with respect to a substantial number of counts that did not result in conviction the end result was not acquittal but hung jury. *Third,* the suggestion is made that the State somehow attempted to frustrate the deposit of the state trial court transcript presumably to raise the spectre that the State was attempting to hide the true facts. The record establishes that due to the size of the transcript, petitioner sought and obtained leave from the district court to file the record by depositing it with the Clerk of Courts of Cuyahoga County for safekeeping and subsequent loan basis to the district court. (Order of September 13, 1979) not reproduced in appendix). Respondents' numerous motions to transmit the record at various stages of the

proceedings stemmed from their nonunderstanding that the record, although not physically kept in the district court, was part of the record of the case. The State was and remains willing to have any Court review the record in this case and let the chips fall where they may. All the State asks is for the opportunity to show that the state court record stands on its own merits. *Fourth,* respondents note that the Sixth Circuit did not rule on their other six claims, finding the voluntariness claim dispositive. If respondents were entitled to relief on any of the other six claims, then the appellate court's treatment of this case is entirely backwards. That Court should have granted relief on the meritorious claims and left to another day this matter of national importance. *Fifth,* respondents seek to impugn the ability of the state trial judge by suggesting he improperly sentenced them. The trial judge first sentenced them each to 28 to 100 years which is the correct aggregates of the minimum and maximum sentences. The trial judge then modified such sentences to 15 to 100 years to reflect the maximum parole eligibility that each respondent faced. How this relates to his ability to determine credibility among disputed versions of events is beyond comprehension. *Sixth,* respondents suggest that somehow the appellate review of their convictions was unfair because the appellate panel was a visiting panel, presumably without knowledge of everyday police improprieties in Cuyahoga County and without the benefit of the two law clerks normally assigned to the regular appellate judges. Aside from the fact that such claims are new and outside of the record in this case, the contention is irrelevant and borders on demeaning the state appellate court judges who reviewed the case. There is no evidence to support that such judges were not competent, fair, or complete in their review of the record in this case. Moreover, visiting judges would be above any local notoriety of the case. What respondents do not do is explain in any way

why the federal appeals court could make factual findings expressly opposite to these judges, particularly with reference to the photographs of the respondents, without explaining how they reached such an opposite result.

Petitioner notes that respondents have attempted to skirt the main issue in this case. At pages 6 and 7 of the answer brief, respondents attempt to dispute the evidence relating to the crime itself and their guilt, as determined by a jury. While suggesting that they, of course, view the record with respect to the statements in a different and contrary light to petitioner, respondents nowhere attempt to directly refute the factual allegations of the petition that the trial court's finding is not only supported by the record, but that the appellate court's rewriting of that record is incorrect. In responding to certiorari, respondents simply rely on cases in which *no* finding was made by the trial court. *Elliott v. Morford,* 557 F. 2d 1228 (6th Cir. 1977), *cert. denied* 434 U.S. 1040. As this case involves a finding which has been ignored, certiorari should be granted.

CONCLUSION

Wherefore, for the above reasons, the petition for writ of certiorari should be granted and the decision of the Circuit Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief to Brief in Opposition to Certiorari has been forwarded to respondents, Craig Fowler, Charles Jordan, and Larry Johnson, through the office of their counsel, Richard L. Aynes, Appellate Review Office, College of Law, the University of Akron, Akron, Ohio 44325, via the U.S. Mail, this _____ day of January, 1983. I further certify that all persons required to be served have been so served. Respondent Fowler's address is London Correctional Institution, P.O. Box 69, London, Ohio 43140. Respondents Jordan and Johnson's address is Marion Correctional Institution, P.O. Box 57, Marion, Ohio 43302.

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